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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
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11 MARCIANO PLATA, et al.,

12 *Plaintiffs,*

13 v.

14 ARNOLD SCHWARZENEGGER, et al.,

15 *Defendants.*  
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Case No. C01-1351 TEH

**SUPPLEMENTAL DECLARATION OF  
RECEIVER J. CLARK KELSO IN  
SUPPORT OF RECEIVER'S MOTION  
FOR ORDER ADJUDGING  
DEFENDANTS IN CONTEMPT FOR  
FAILURE TO FUND RECEIVER'S  
REMEDIAL PROJECTS AND/OR FOR  
AN ORDER COMPELLING  
DEFENDANTS TO FUND SUCH  
PROJECTS**

Date: October 6, 2008

Time: 10:00 a.m.

Courtroom: Hon. Thelton E. Henderson

1 I, J. Clark Kelso, declare as follows:

- 2 1. I am the Court-appointed Receiver in this matter, appointed pursuant to this Court's  
3 Order, dated January 23, 2008. I have custody of the files pertaining to the Receivership  
4 and am familiar with the contents thereof. The facts set forth herein are based on my  
5 review of the Receivership records and documents which are a matter of public record as  
6 well as my own personal knowledge. If called as a witness, I could competently testify  
7 thereto.
- 8 2. In their opposition to this motion, Defendants have suggested that I and my staff have  
9 already determined to spend \$8 billion for the proposed 10,000 bed and facilities upgrade  
10 construction projects and that, by this motion, we seek recovery of all \$8 billion at one  
11 time. This is not the case as Defendants well know. State employees have been on the  
12 teams that have developed the planning and programming for the construction projects  
13 from the inception. All such planning and programming has been undertaken in  
14 cooperation and coordination with CDCR, the Department of Mental Health and the court  
15 representatives in *Coleman, Perez and Armstrong*. I and my staff have regularly apprised  
16 the Governor, the Director of Finance and other senior State officials of my construction  
17 plans, including the level of funding needed, and when funding will be needed. The  
18 expected costs of the projects developed by these teams has been regularly shared and  
19 discussed among all stakeholders. The suggestion that anything about the construction  
20 planning and development has been somehow kept secret by the Receivership is simply  
21 false.
- 22 3. The Turnaround Plan of Action as approved by this Court explains the basic reasons why  
23 it is necessary to build expanded prison health facilities and housing for approximately  
24 10,000 of CDCR's existing inmate population whose medical and/or mental conditions  
25 require separate housing to facilitate appropriate, cost-effective access to necessary health  
26 care services. Based on independent, expert assessments of the medical and mental health  
27 care needs of CDCR's population which were conducted last year, there is today a  
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1 demonstrated need for seven separate facilities, each of which will serve approximately  
2 1,500 patients. Consolidating these patients in facilities that have been specially designed  
3 to handle their health care needs is the most cost-effective approach to delivering  
4 necessary health care services.

5 4. The Receiver has placed a very high priority upon completing its expansion construction  
6 program in as short a period of time as feasible. Expedited construction will significantly  
7 reduce total construction costs and will also help bring the Receivership to a close as  
8 quickly as possible. To that end, the Receiver has directed its construction project  
9 manager to employ a state-of-the-art management approach known as "Integrated Project  
10 Delivery." The State's more traditional design-bid-build approach stretches out project  
11 completion since each step in the process is handled sequentially. Using Integrated  
12 Project Delivery, these sequential steps can be significantly compressed into a much  
13 smaller number of steps taken in parallel.

14 5. Integrated Project Delivery involving seven facilities to be built over a four- to five-year  
15 period cannot be effectively employed if the Receiver must come back to the Legislature  
16 every year or two for additional funding. As this year has amply demonstrated, the  
17 Legislature is simply incapable of acting in a timely manner when it comes to major  
18 funding decisions. For this reason, the Receiver sought authority from the Legislature  
19 for the full amount of funding necessary to complete all seven facilities, and the Receiver  
20 explained to the Legislature why it was necessary to grant that authority for full funding  
21 now instead of requiring the Receiver to seek supplemental appropriations. The Receiver  
22 also sought, following the Administration's advice, to finance construction through  
23 bonds, thereby spreading out the costs of construction over a two or three decade period.

24 6. In the Spring of 2008, the State legislature was considering legislation (SB 1665) to  
25 authorize approximately \$7 billion in bond financing for my construction projects. At the  
26 time, a number of legislators expressed concerns about whether I intended to spend the  
27 entire amount appropriated, and whether the entire amount was actually necessary given  
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1 possible changes in CDCR's population levels and in the inmate populations' health care  
2 needs. In response to these concerns, I agreed to language in the bond bill which divided  
3 the overall project into three phases and required my staff and I to reassess the need for  
4 additional construction on an annual basis. The reassessment is intended to ensure that  
5 taxpayer dollars are not spent building unnecessary health care facilities. Defendants  
6 were fully apprised of this modification to the proposed legislation and expressed no  
7 opposition to it.

8 7. I have also convened an expert "Construction Oversight and Advisory Board" to assist  
9 me and my staff in managing all of the construction projects as cost-effectively as  
10 possible. The goal of this advisory board is to help me maximize the value out of every  
11 tax dollar spent building these facilities.

12 8. In summary, I have tried in a number of creative ways to structure and manage the  
13 construction program to reduce overall construction costs as much as possible. I am  
14 confident that there is a compelling need for these facilities, and the Receivership is doing  
15 everything it can to ensure that overall construction project costs are closely monitored  
16 and controlled.

17 9. As set forth in my declaration filed with the original moving papers on this motion, I  
18 suggested several alternative funding strategies to the Governor, Department of Finance  
19 and State Controller's Office following the defeat of SB 1665 in the Legislature.  
20 Defendants rejected those alternatives.

21 10. On June 3, 2008, I and others from the Receiver's Office attended a meeting with senior  
22 officials and counsel from the Governor's Office, the Department of Finance, the State  
23 Controller's Office and the State Treasurer's Office to discuss possible alternatives to  
24 financing the Receiver's capital projects. During the course of the meeting, we shared  
25 with them our belief that Defendants could legitimately proceed to finance the projects in  
26 the absence of legislative action pursuant to the Governor's emergency powers as  
27 outlined in the overcrowding Emergency Proclamation he had issued in October 2006.

1 We also stressed that Paragraph IV of the Order Appointing Receiver (entitled "COSTS")  
2 required Defendants to fund the implementation of the Receiver's plans, even in the  
3 absence of legislative inaction. My chief counsel, Jared Goldman, reiterated these points  
4 in a letter, dated June 9, 2008, to the Chief Deputy of Legal Affairs in the Governor's  
5 Office.

6 11. At the June 3 meeting, I also explored with them the possibility of obtaining bond  
7 financing through the California Infrastructure and Economic Development Bank ("I-  
8 Bank"), which is authorized to issue tax-exempt bond financing for certain types of  
9 capital projects. Thereafter, at my direction, members of my staff, including Richard  
10 Kirkland, Director, Plata Support Division, Jared Goldman, Chief Counsel, and Ernest  
11 Van Sant, Capital Outlay Consultant, met with I-Bank staff, I-Bank counsel (Orrick  
12 Herrington) and representatives of the underwriters to discuss financing strategies and the  
13 steps required to fund the Receiver's Prison Health Care Construction Program with I-  
14 Bank issued bonds.

15 12. The topics at the meeting included the scope and content of the Receiver's construction  
16 program and the means and methods of an I-Bank transaction. It was agreed that  
17 following the issuance of an appropriate court order, a bond sale could begin very rapidly  
18 (within 90 days) to finance the project. The bonds would be sold in increments over  
19 several years on an "as needed" basis and would be secured through either an asset-lease  
20 basis (lease-revenue bonds) or on a general revenue stream basis (revenue bonds). The  
21 repayment of the bond debt would be subject to annual appropriations from the  
22 Legislature. The I-Bank executives and the finance team expressed their belief that the  
23 revenue bonds would trade at a rate comparable to the State Public Works Board lease-  
24 revenue bonds. The attendees agreed that underwriters should begin development of the  
25 financing plan and the attorneys would begin drafting the appropriate court order  
26 necessary to authorize the transaction.

- 1 13. In June 2008, my staff worked with the underwriters and bond counsel to develop a  
2 preliminary term sheet and financing plan, provided them with project cash flow needs,  
3 and conferred with them regarding the necessary transactional documents. On or about  
4 July 3, 2008, my staff, the underwriters and officials from the State Treasurer's Office  
5 ("STO") met to discuss the status of the transaction. STO officials expressed concern  
6 that the bonds could not be marketed without a State budget; the group therefore  
7 considered issuing Bond Anticipation Notes that could be quickly marketed pending  
8 receipts from bond sales. We also understood from this meeting that the Governor's  
9 Office, the Attorney General's Office and the State Controller's Office were conferring  
10 regarding the I-Bank transaction.
- 11 14. By late July, there had been little progress made on the transaction, although I understood  
12 from officials at the STO that the Attorney General's Office had been requested to issue a  
13 legal opinion regarding the possibility of loans from the State's Pooled Money Investment  
14 Board. On or about July 31, 2008, I-Bank counsel circulated a draft Reimbursement  
15 Resolution with a cautionary note that it did not constitute a commitment by the I-Bank.
- 16 15. By early August, since we had received no proposed transaction documents from counsel  
17 for I-Bank or from the Attorney General's Office, I instructed my attorneys to draft a  
18 proposed stipulation and order to submit to the Court approving the transaction and to  
19 forward the draft to the Attorney General's Office for review, comment and any necessary  
20 revision. I also instructed my staff to begin completing an I-Bank application.
- 21 16. By the time this motion was filed on or about August 13, 2008, we still had no indication  
22 that the State and its attorneys were moving forward with the transaction. In fact, once  
23 the motion was filed, we heard nothing from anyone at the State regarding the transaction.
- 24 17. In or about the second of week of September, because we still had heard nothing from  
25 State officials, I instructed my counsel to contact the Attorney General's Office to  
26 determine if anyone there was working on the stipulation and order and other aspects of  
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1 the transaction. As a result of those conversations, I learned that the Attorney General  
2 was not working on the I-Bank transaction.

3 18. On or about September 15 or 16, 2008, I learned from a STO official that the Attorney  
4 General had determined it had some sort of "conflict" and therefore would not be  
5 working on the I-Bank transaction. So far as I am aware, my attorneys working on the  
6 transaction have not been contacted by any new counsel representing the State in  
7 connection with the I-Bank transaction and, as a result, the transaction appears to be  
8 stalled.

9 19. While this motion has been pending, I have continued to work with State legislators to  
10 pursue legislation that would authorize bond financing for the capital projects. That bill,  
11 AB 1819, was generally similar to SB 1665, which had been previously defeated,  
12 although AB 1819 included an additional \$1 billion to account for the construction of  
13 dental facilities as part of the facilities upgrade project. I understood that AB 1819 was to  
14 be included as part of the budget package enacted by the Legislature. Unfortunately, and  
15 for reasons that are completely unrelated to the Receiver's construction program, the  
16 Legislature passed a budget, but AB 1819 was stripped out of the package and never put  
17 to a vote. The Legislature's failure to vote on AB 1819 actually happened on two  
18 occasions, first when the Legislature passed its original budget, and then again when it  
19 passed the final budget to which the Governor agreed. Thus, the Legislature has failed for  
20 a third and fourth time to enact enabling legislation for bond financing of the 10,000 bed  
21 and facilities upgrade projects. So far as I am aware, there is no prospect for any further  
22 legislation until the next legislative session in 2009.

23 20. If a source of long term funding is not assured before that time, the Integrated Project  
24 Delivery process may well collapse, the millions that have already spent on the  
25 development phases of the projects may well have been wasted and these critical  
26 construction projects will be indefinitely delayed. I cannot stress enough the urgency of  
27 obtaining assurances that a source of funding will be provided.

1 I declare under penalty of perjury under the laws of the State of California that the  
2 foregoing is true and correct.

3 Dated: September 22, 2008

4 /s/ J. Clark Kelso  
J. Clark Kelso

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9 I hereby attest that I have on file all holograph  
10 signatures for any signatures indicated by a  
"conformed" signature (/s/) within this efiled  
document.

11  
12 /s/ Martin H. Dodd  
Martin H. Dodd  
13 Attorneys for Receiver J. Clark Kelso



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman & Dupree LLP, 160 Sansome Street, 17<sup>th</sup> Floor, San Francisco, CA 94104. I am over the age of 18 and not a party to the within action.

I am readily familiar with the business practice of Futterman & Dupree, LLP for the collection and processing of correspondence.

On September 22, 2008, I served a copy of the following document(s):

**SUPPLEMENTAL DECLARATION OF RECEIVER J. CLARK KELSO  
IN SUPPORT OF RECEIVER'S MOTION FOR ORDER ADJUDGING  
DEFENDANTS IN CONTEMPT FOR FAILURE TO FUND RECEIVER'S  
REMEDIAL PROJECTS AND/OR FOR AN ORDER COMPELLING  
DEFENDANTS TO FUND SUCH PROJECTS**

by placing true copies thereof enclosed in sealed envelopes, for collection and service pursuant to the ordinary business practice of this office in the manner and/or manners described below to each of the parties herein and addressed as follows:

— BY FACSIMILE: I caused said document(s) to be transmitted to the telephone number(s) of the addressee(s) designated.

X BY MAIL: I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated below. I am readily familiar with Futterman & Dupree's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

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21  
22 I declare that I am employed in the offices of a member of the State Bar of this Court at  
23 whose direction the service was made. I declare under penalty of perjury, under the laws of the  
united State of America, that the above is true and correct.

24 Executed on September 22, 2008 at San Francisco, California.

25   
26 \_\_\_\_\_  
Lori Dotson